# In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 515

W. E. B. DUBOIS CLUBS OF AMERICA, ET AL.,
APPELLANTS

*v.*

RAMSEY CLARK, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## MOTION TO AFFIRM

The Solicitor General, on behalf of the Attorney General and the members of the Subversive Activities Control Board, moves the Court to affirm the judgment of the district court.

### STATEMENT

This is a direct appeal from the judgment of a three-judge district court (J.S. 1a–4a) dismissing the appellants' suit to enjoin, on constitutional grounds, enforcement of the registration provisions of the Subversive Activities Act of 1950, 50 U.S.C. 786. The



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action was instituted in April 1966,[1] a few weeks after the Attorney General had petitioned the Subversive Activities Control Board for an order requiring W. E. B. DuBois Clubs of America to register as a "Communist-front organization" (see J.S. 5a–11a) and before any administrative proceedings had been undertaken.[2] The immediate object of the suit was to halt the Board proceedings at their inception; the ultimate prayer was for a judgment declaring unconstitutional, and permanently enjoining the enforcement of, the provisions of the Act requiring Communist-front organizations to register.

After hearing, the three-judge court dismissed the complaint. It held that appellants could not short-circuit the statutory procedure, which provides for judicial review of any registration order after administrative proceedings have been concluded, observing (J.S. 3a):

> * * * The initiation of proceedings to require an organization to register under the Act may well present some practical problems in the area of free expression, but Congress has made careful provision that no tangible sanctions can

[1] In addition to the parent organization, W. E. B. DuBois Clubs of America, the plaintiffs were three local affiliates, three officers, and fourteen individuals, not members of any DuBois Club, who sued "individually and on behalf of all American citizens who seek to exercise without fear of retaliation on the fundamental rights guaranteed to all American citizens in the First Amendment * * *."

[2] No Board proceedings have been held to date. The Board took no action while the case was pending before the district court and administrative proceedings are now stayed by order of the court of appeals until the appeal is disposed of here (see J.S. 11, n. 8).

come into play until the facts have been explored in open hearing and the courts have scrutinized what they show, both in their adequacy to support a registration order and in their constitutional impact upon the statute itself.

## ARGUMENT

The only question properly presented on this appeal is whether the district court abused its discretion in declining to entertain, before the prescribed administrative proceedings had been undertaken, a challenge to provisions of the Subversive Activities Control Act requiring Communist-front organizations to register, on the ground that those provisions are unconstitutional on their face. The constitutional questions themselves were not decided below and are not here. In our view, the district court correctly refrained from making a premature adjudication of those issues.

What was attempted here is, of course, contrary to the usual rule which requires exhaustion of a statutorily prescribed administrative remedy before recourse is made to the courts. See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 543–545; *Fahey* v. *Mallonee*, 332 U.S. 245, 254, 256–258; *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481–482. Certainly, there is no basis for short-circuiting the statutory scheme here on the ground that the administrative procedures are deficient. Section 13 of the Act (50 U.S.C. 792) provides a full due process hearing in registration proceedings under Section 7. The respondent has the right to appear by counsel,

to subpoena witnesses and documents, and to cross-examine the Attorney General's witnesses; a full stenographic record is made and the Board is required to support its order with written findings of fact. And Section 14 (50 U.S.C. 793) provides for full judicial review in the court of appeals, and then, on certiorari, in this Court. See *Communist Party* v. *Control Board,* 367 U.S. 1. In this respect, as the Court itself has noted, the procedures of the McCarran Act are to be contrasted with those invalidated in *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, and *Dombrowski* v. *Pfister,* 380 U.S. 479—this last, a decision upon which appellants place much reliance. See 341 U.S. at 173, 380 U.S. at 495–496, n. 12.

Nor is appellants' attempt to circumvent the statutory procedure for judicial review justified here because they present constitutional arguments. See, *e.g., Aircraft & Diesel Corp.* v. *Hirsch,* 331 U.S. 752, 771–774; *Allen* v. *Grand Cent. Aircraft Co.,* 347 U.S. 535, 553. On the contrary, that circumstance properly invokes the rule that constitutional questions—serious ones, especially[3]—should not be anticipated in advance of the necessity for deciding them. See *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568–585. No registration order having yet been entered, it is of course impossible to know whether the occasion for determining the constitutionality of the registration

[3] See *American Committee* v. *SACB,* 380 U.S. 503, 505; *Veterans of the Abraham Lincoln Brigade* v. *SACB,* 380 U.S. 513, 514, characterizing the constitutional questions raised here as "serious." See n. 4, *infra.*

provisions of the Act will ever arise in appellants' case.

To be sure, the claim now advanced is that the mere invocation of the law against appellants abridges First Amendment rights and *Dombrowski* v. *Pfister* is cited for the proposition that in those circumstances immediate judicial intervention is called for. But the fact is that the cases are not comparable. As already noted, the laws struck down in *Dombrowski* were plainly unconstitutional on their face and, there was, moreover, a persuasive showing that they were invoked discriminatorily to harass legitimate activities. And there, also, the immediacy of the injury resulting from pending prosecutions was clearly evident. At all events, however, it seems to us dispositive—as it did to the court below—that this Court, on the very day it decided *Dombrowski*, refused to adjudicate the very constitutional questions now advanced against the registration provisions of the McCarran Act on the ground that it was "neither necessary nor appropriate" to do so before it had been firmly established that the complainant was subject to the obligation of registering. *American Committee* v. *SACB*, 380 U.S. 503, 505; *Veterans of the Abraham Lincoln Brigade* v. *SACB*, 380 U.S. 513, 514.[4] The district court cannot be criticized for following that example.

[4] In both of those cases, as here, the registration provisions of the Act were challenged as unconstitutional on their face under the First Amendment and on the ground of vagueness. See p. 2, 22–24 of the petition and pp. 102–109 of petitioner's brief in No. 44, O.T. 1964; pp. 3, 13–15 of the petition and pp. 45–51 of petitioner's brief in No. 65, O.T. 1964.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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